Hoe Thean Sun & Anor v Lim Tee Keng

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22-117 OF 1994
KN SEGARA J
21 JUNE 1998

***Tort** — Defamation — Qualified privilege — Statements made in police report — Onus to prove malice on plaintiff — Whether filing of civil suit negatives malice — Whether failure to withdraw police report and failure of civil suit relevant*

The defendant was a director and shareholder of Sey Hoe Sdn Bhd ('Sey Hoe'). On 1 September 1993, he lodged a police report pertaining to the sale of shares in Sey Hoe. The plaintiff was the solicitor who prepared the sale and purchase agreement of the shares. The plaintiff brought an action against the defendant alleging that certain statements appearing in the police report were defamatory of him. The defendant testified that he believed the facts stated in the police report were true at the time he lodged the report. It was noted that the defendant had obtained an ex parte injunction to restrain Sey Hoe from transferring the shares.

Held, dismissing the claim:

(1) When words are published which are both false and defamatory, the law presumes malice on the part of the person who publishes them. However, when the publication takes place under circumstances which create qualified privilege, the presumption of malice is rebutted by the privilege and the plaintiff has to prove express or actual malice on the part of the person responsible for the publication to defeat the privilege. The law clearly recognizes that all statements made in a police report are statements made on a privileged occasion. However, the privilege is qualified and not absolute (see p 142 B–D).

(2) The onus lies on the plaintiff to prove malice and not the defendant to prove his bona fides or absence of malice. When the occasion is privileged, the bona fides of the defendant is always presumed. In the present case, there was no doubt that in law the defendant published the defamatory statements on a privileged occasion. It was therefore to be assumed that he published it honestly believing his statements to be true unless there was some evidence to the contrary (see p 142E–F).

(3) The fact that the defendant had filed a civil suit against the plaintiff tend to negative any malice on the part of the defendant and in fact reinforced the defendant's assertion that he sincerely believed the statements in the report were true. For the purpose of determining malice at the time the report was made, it was irrelevant whether the defendant succeeded in his suit against the plaintiff. The fact that he instituted the suit was clear evidence of bona fides on his part. The fact that the defendant had not withdrawn the police report to date even after he lost his case

against the plaintiff was totally irrelevant to the issue of malice at the time the statements were made in the police report. The plaintiff had failed to discharge the onus to prove malice. There was neither intrinsic nor extraneous evidence of actual malice in this case. The defence of qualified privileged must succeed (see pp 142I–143C).

[Bahasa Malaysia summary

Defendan adalah pengarah dan juga pemegang saham Sey Hoe Sdn Bhd ('Sey Hoe'). Pada 1 September 1993, beliau telah membuat laporan polis berkenaan dengam penjualan saham-saham Sey Hoe. Plaintif adalah peguam yang menyediakan perjanjian jual beli saham-saham tersebut. Plaintif telah membawa tindakan terhadap defendan dengan mengatakan bahawa beberapa kenyataan yang terdapat di dalam laporan polis memfitnahnya. Defendan telah memberikan keterangan bahwa beliau percaya bahawa fakta-fakta yang dinyatakan di dalam laporan polis adalah benar pada masa beliau membuat laporan polis. Perlu diperhatikan bahawa defendan telah mendapat injunksi ex parte untuk menghalang Sey Hoe daripada memindahkan saham-saham.

Diputuskan, menolak tuntutan tersebut:

(1) Apabila perkataan-perkataan yang tidak benar dan memfitnah diterbitkan, undang-undang menganggap terdapat niat jahat di pihak orang yang menerbitkannya. Tetapi, apabila penerbitan tersebut berlaku di bawah keadaan yang mewujudkan keistimewaan bersyarat, anggapan niat jahat dipatahkan oleh keistimewaan tersebut dan plaintif terpaksa membuktikan niat jahat yang nyata atau sebenar di pihak orang yang bertanggungjawab untuk penerbitan tersebut untuk menolak keistimewaan tersebut. Undang-undang dengan jelas mengakui bahawa semua kenyataan-kenyataan yang dibuat di dalam laporan polis adalah kenyataan-kenyataan yang dibuat atas keistimewaan. Tetapi keistimewaan tersebut adalah bersyarat dan tidak mutlak (lihat ms 142B–D).

(2) Beban adalah terletak di atas plaintif untuk membuktikan niat jahat dan bukan defendan untuk membuktikan bona fide atau ketiadaan niat jahat. Apabila wujud keistimewaan, bona fide defendan adalah sentiasa dianggapkan. Di dalam kes ini, tidak dapat disangsikan bahawa di dalam undang-undang, defendan telah menerbitkan kenyataan-kenyataan yang memfitnah semasa wujud keistimewaan. Oleh itu, boleh dianggapkan bahawa beliau telah menerbitkannya dengan secara jujur mempercayai bahawa kenyataan-kenyataannya adalah benar kecuali terdapat keterangan di sebaliknya (lihat ms 142E–F).

(3) Fakta bahawa defendan telah memfailkan tindakan sivil terhadap plaintif berkencenderungan untuk menidakkan sebarang niat

jahat di pihak defendan dan sebenarnya menyokong penegasan defendan bahawa beliau benar-benar percaya bahawa kenyataan-kenyataan tersebut di dalam laporan tersebut adalah benar. Bagi tujuan untuk menentukan niat jahat pada masa laporan dibuat, ia adalah tidak berkaitan sama ada defendan berjaya di dalam tindakannya terhadap plaintif. Fakta bahawa beliau memulakan tindakan tersebut adalah keterangan jelas bona fide di pihaknya. Fakta bahawa defendan tidak menarik balik laporan polis tersebut sehingga kini walaupun selepas kalah dalam kes terhadap plaintif adalah tidak berkaitan sepenuhnya kepada isu niat jahat pada masa kenyataan-kenyataan dibuat di dalam laporan polis. Plaintif telah gagal untuk memuaskan beban untuk membuktikan niat jahat. Tidak juga terdapat keterangan dalaman atau luaran berkenaan niat jahat yang sebenar di dalam kes. Pembelaan keistimewaan bersyarat tersebut mestilah berjaya (lihat ms 142I–143C).]

Notes

For cases on defamation generally, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 138–261.

Cases referred to

Horrocks v Lowe [1975] AC 135 (refd)

George John (*George John & Co*) for the plaintiffs.
John Khoo (*Ismail, Khoo & Associates*) for the defendant.

KN Segara J: The plaintiff's cause of action in defamation arises from certain statements appearing in a police report made on 1 September 1993 by the defendant. The defendant is a director and shareholder of Sey Hoe Sdn Bhd. The collective equity ownership of the defendant, together with his brothers and Alor Janggus Soon Seng Sdn Bhd, in Sey Hoe Sdn Bhd is 43.75% (according to the report).

The first plaintiff is an advocate & solicitor practising under the name of Hoe & Ahmad Zaki, in partnership with the second plaintiff.

The first plaintiff is furious over the police report because the defendant has made groundless allegations that the first plaintiff has parted with 682,500 original share certificates in MGR Corp, belonging to Sey Hoe Sdn Bhd, to Lim Chin Teik, the managing director of Sey Hoe Sdn Bhd.

Lim Chin Teik is a friend of the first plaintiff. The first plaintiff was acting as the solicitor for the vendor, Sey Hoe Sdn Bhd, and prepared the sale and purchase agreement of the shares set out in the agreement dated 1 September 1992 (p 1, Bundle B) and the supplemental agreement dated 1 November 1992 (p 5, Bundle B). The first plaintiff only took instructions from Lim Chin Teik.

On 1 April 1993, the defendant had obtained an ex parte injunction in the Penang High Court Civil Suit No 22–109–93 to restrain Sey Hoe Sdn Bhd from transferring the shares referred to in the sale and purchase

A agreement dated 1 September 1992. The injunction was set aside on 2 April 1993 but reinstated by the Supreme Court in Supreme Court Civil Appeal No 02–569–93 on 5 May 1994, and an early trial ordered.

The first plaintiff knew a police report had been lodged by the defendant when one DSP Lim Cha Boh asked him to go to the Alor Setar B police HQ because he wanted to record a statement from him. In the course of giving the police statement in October 1993, the police report was referred to him and he read the whole report. The first plaintiff agreed in cross-examination that most of the particulars of fraud in the report referred to Lim Chin Teik. It is a 6 page report (p 2, Bundle A).

The second plaintiff was informed by the first plaintiff, his partner, that C a police report had been lodged against the first plaintiff and the firm. The second plaintiff was aware that there were police investigations over the report as he was informed about it by the first plaintiff. The second plaintiff said that he had read the report. He assumed that the report had been applied for by the first plaintiff. He testified there were 21 paragraphs and D the majority of the paragraphs dealt with allegations of fraud by the managing director, Lim Chin Teik. In respect of the specific allegations against his partner and the firm, he testified the allegations were false.

The defendant testified he lodged the police report on 1 September 1993 at Bukit Aman, Kuala Lumpur. He said his report was basically against the managing director of Sey Hoe Sdn Bhd and the particulars of E fraud and criminal breach of trust were made against Lim Chin Teik. He believed the facts stated in the report were true at the time he lodged the report. DSP Lim Cha Boh interviewed him and took a statement from him. The defendant did not show the report to any third party. When he lodged the report he did not intend to defame anybody. Under cross-examination, F he confirmed the particulars in the report were extracts from his affidavit in the two civil suits in the Penang High Court, CS No 22–109–93 and CS No 22–169–93. He testified that when he lodged the report in September 1993, he had evidence that the vendor had lodged the original certificates with the first plaintiff, as required under cl 5 of the sale and purchase agreement. He further testified that when he lodged the report in G September 1993, he still did not believe what Mr Hoe (the first plaintiff) had told him on 17 March 1993 — ie that the original shares had not been lodged with him by the vendor. When he lodged the report he honestly believed there was a criminal act committed by the managing director.

The defendant also testified that when he said in his report:

H > ... peguam Hoe Thean Sun mesti menyimpan saham-saham asal MGR Corp.
>
> Hoe Thean Sun membenarkan saham asal MGR Corp diambil oleh Lim Chin Teik, ...

his basis was the two sale and purchase agreements dated 1 September 1992 and 1 November 1992. Likewise, when he said in his report:

I > ... peguam harus menyimpan saham asal ...

he testified that the basis for the statement were the two agreements and that he honestly believed that his statements were true.

There are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and infact untrue. On such occasions a man, stating what he believes to be the truth about another, is protected in so doing, provided the statement is made honestly and without any indirect and improper motive. These occasions are called occasions of qualified privilege.

When words are published which are both false and defamatory, the law presumes malice on the part of the person who publishes them. However, when the publication takes place under circumstances which create qualified privilege the presumption of malice is rebutted by the privilege and the plaintiff has to prove express or actual malice on the part of the person responsible for the publication to defeat the privilege.

Qualified privilege is a defence only to the extent it throws on the plaintiff the burden of proving express malice. Once the plaintiff succeeds in doing this it becomes immaterial that the publication was on a privileged occasion.

The law clearly recognizes that all statements made in a police report are statements made on a privileged occasion. However, the privilege is qualified and not absolute. The primary purpose of a police report is to set in motion the investigation of an offence and bring to justice the offender and perpetrators, if any, at the conclusion of the investigation by the appropriate authorities.

The onus lies on the plaintiff to prove malice and not the defendant to prove his bona fides or absence of malice. When the occasion is privileged the bona fides of the defendant is always presumed. In this case, there is no doubt that, in law, the defendant published the defamatory statements on a privileged occasion. It is, therefore, to be assumed that he published it honestly, believing his statements to be true, unless there is some evidence to the contrary, for example, that the defendant was fully apprised of the letter dated 20 May 1992 (p 10, Bundle B) and the letter dated 5 November 1992 (p 11, Bundle B) at any time before he lodged his report. The fact that the defendant had been informed by the first plaintiff on 17 March 1993 that the MGR shares had not been deposited with him and that he had also informed the defendant's solicitors by letter dated 7 April 1993 (p 14, Bundle B) and letter dated 12 April 1993 (p 1, Bundle A) that the original share certificates were never in his possession, cannot establish malice without the further evidence that the defendant was fully aware of the letter dated 20 May 1992 (p 10, Bundle B) and letter dated 5 January 1992 (p 11, Bundle B), coupled with the fact that the said letters had been brought to his attention (before he made the report) either by Sey Hoe Sdn Bhd or the plaintiffs themselves, in support of the claim that the shares were never in fact in the possession of the first plaintiff at any time after the sale and purchase agreement had been executed.

The fact that the defendant, together with the other shareholders of Sey Hoe Sdn Bhd, had filed a civil suit against the plaintiffs in the Penang High Court (Civil Suit No 22–169–93) tends to negative any malice on the part

of the defendant and in fact reinforces the defendant's assertion that he sincerely believed the statements in the report were true.

In the final analysis, for the purpose of determining malice at the time the report was made, it is irrelevant whether the defendant succeeded in his suit against the plaintiffs at the Penang High Court (Civil Suit No 22–169–93). The fact he instituted the suit is clear evidence of bona fides on his part. The fact that the defendant has not withdrawn the police report to-date, even after he lost his case against the plaintiffs in the Penang High Court Civil Suit No 22–169–93, is totally irrelevant to the issue of malice at the time the statements were made in the police report. The plaintiffs have failed to discharge the onus to prove malice. There is neither intrinsic nor extraneous evidence of actual malice in this case. The defence of qualified privilege must succeed. It is important to remind ourselves of what Lord Diplock said in *Horrocks v Lowe* [1975] AC 135 at p 150:

> Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that 'express malice' can properly be found.
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> There may be evidence of the defendant's conduct upon occasions other than that protected by the privilege which justify the inference that upon the privileged occasion too his dominant motive in publishing what he did was personal spite or some other improper motive, even although he believed it to be true. But where, as in the instant case, conduct extraneous to the privileged occasion itself is not relied on, and the only evidence of improper motive is the content of the defamatory matter itself or the steps taken by the defendant to verify its accuracy, there is only one exception to the rule that in order to succeed the plaintiff must show affirmatively that the defendant did not believe it to be true or was indifferent to its truth or falsity. Juries should be instructed and judges should remind themselves that this burden of affirmative proof is not one that is lightly satisfied.
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> The exception is where what is published incorporates defamatory matter that is not really necessary to the fulfilment of the particular duty or the protection of the particular interest upon which the privilege is founded. Logically it might be said that such irrelevant matter falls outside the privilege altogether. But if this were so it would involve the application by the court of an objective test of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be

illusory if it were lost in respect of any defamatory matter which upon logical analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right upon which the privilege was founded. As Lord Dunedin pointed out in *Adam v Ward* [1917] AC 309 at pp 326–327 the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realized that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here, too, judges and juries should be slow to draw this inference.

The plaintiff's claim is dismissed with costs.

Claim dismissed with costs.

Reported by Jafisah Jaafar.